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No. 01-178

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In The

# Supreme Court of the United States

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

*Petitioner,*

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF *AMICI CURIAE* UNITED STATES COMBINED HEAT AND POWER ASSOCIATION, AMERICAN GAS COOLING CENTER, INTERNATIONAL DISTRICT ENERGY ASSOCIATION, AND DISTRIBUTED POWER COALITION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* United States Combined Heat and Power Association (USCHPA), American Gas Cooling Center (AGCC), International District Energy Association (IDEA), and Distributed Power Coalition of America (DPCA) (collectively, the Associations) are nonprofit trade associations sharing a common interest in the ongoing development of more competitive markets for energy services in the United States.[1] Their members participate actively in such markets as manufacturers of equipment, developers of energy services and projects, or major consumers of energy services meeting improved economics. This case could impede the continued ongrowth of such markets, as it could affect the extent to which the state action immunity doctrine can be used to immunize anticompetitive actions of a regulated utility participating in such markets outside the explicitly defined boundaries of its monopoly and outside the supervisory purview of state regulators. Its resolution will affect many more active participants in U.S. energy markets than merely Trigen-Oklahoma City Energy Corporation (Trigen) and Oklahoma Gas & Electric Company (OG&E), the sole petitioner and sole respondent in this proceeding.

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[1] The Associations submit this brief with the consent of the parties. Both Trigen-Oklahoma City Energy Corporation and Oklahoma Gas & Electric Company have filed letters providing a blanket consent to the filing of briefs amicus curiae with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, amici curiae state that this brief in its entirety was authored by amici curiae and their counsel. No monetary contributions were made for the preparation or submission of this brief by any person other than amici curiae, their members or their counsel.

## STATEMENT OF THE CASE

*Amici* adopt the statement of the case in Petitioner's brief.

## REASONS FOR GRANTING THE WRIT

### Summary of the Argument

In the energy sector, as earlier in transportation and communications, markets that have traditionally been regulated are evolving into competitive markets. Utility companies that have traditionally served franchise markets through local monopolies increasingly offer their products in competitive markets for energy services that are not regulated. As these evolutions have occurred, the lines of the state action immunity doctrine as it was originally applied have begun to blur. This case presents a ripe example of the resulting inadequacy of existing law when a regulated energy utility seeks to shield itself from antitrust liability for anticompetitive actions in a market where its product competes with other energy products to provide energy services, and the state regulates neither the market nor the utility's particular actions.

*Amici curiae* Associations argue that this evolution of markets and the public policy that favors it will be frustrated if state action immunity is extended, as it would be

by the Tenth Circuit in the decision below, from the regulated market for an energy product, in this case electricity, into unregulated markets where that product is but one competing form of energy to provide energy services, in this case cooling services for buildings.

*Amici* further argue that, even assuming that OG&E were not operating outside the bounds of a market in which OG&E was authorized to maintain a monopoly, the Tenth Circuit wholly failed to consider the adequacy of the state's supervision of OG&E's anticompetitive actions. The Court should grant the writ and review this case in order to clarify the appropriate degree of state supervision of monopolistic activity required to exempt monopoly under the state action doctrine, resolving a variety of interpretations among the Circuit courts of which the Tenth Circuit Court decision is an extreme example.

## I. THIS CASE PRESENTS AN ISSUE CRITICAL TO THE NATIONAL POLICY INTEREST IN COMPETITIVE ENERGY MARKETS

As the general economic trend toward reducing regulation and bringing competitive market forces to bear in the U.S. economy sweeps across the energy industries (as it has previously swept across the telecommunications and transportation industries), new energy market entrants, including many of the members of the Associations joined as *amici curiae* in this brief, seek to compete to provide energy products and services. In so doing, they frequently compete with entities that once had a legal monopoly in portions of those markets that have become

competitive, and may still have legal monopolies in other portions of those markets.

*Amici curiae* believe that it is critical that the bounds of antitrust immunity for regulated monopolies coincide precisely with the bounds of the remaining regulated monopoly portions of those markets. It is equally critical that potentially anticompetitive behavior be disciplined within those bounds by conscious and effective state supervision. This Court has long recognized the importance of these two factors in prior cases by making them the two prongs of the "state action immunity doctrine," exempting regulated utilities from antitrust liability for anticompetitive actions only if they were taken within the defined regulated sphere and under meaningful state supervision. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). It is time to reinforce and clarify the limitations on the scope of antitrust immunity conferred upon a regulated energy utility where its energy product is sold in unregulated competition with other energy products that can meet the same energy need, and when the state neither regulates the market for those energy services nor supervises the utility's actions in that market.

USCHPA, AGCC, IDEA, and DPCA, as *amici curiae*, bring a broad, industry-wide perspective to this issue:

- *Amicus* United States Combined Heat and Power Association represents for-profit and non-profit entities who support and promote the proliferation of highly-efficient, environmentally-beneficial combined heat and power technologies. By capturing and utilizing (for steam, heating, cooling, air treatment, or other

purposes) the thermal energy of a combustion process also used in the generation of electricity, CHP projects achieve energy efficiencies of two to three times the efficiencies of conventional power generation. At the same time and by the same means, they reduce emissions to half or less of the emissions produced when fuel is consumed separately for these purposes. The success of CHP projects requires markets for energy services in which customers can recognize and elect the high energy and environmental efficiency of CHP in fair competition with separate electricity and thermal energy services, including products that may be marketed by regulated utilities.

- *Amicus* American Gas Cooling Center promotes the development, demonstration, and implementation of high-efficiency distributed technologies for cooling, including combinations of cooling with heating and other energy services. Members of AGCC include natural gas distribution companies, municipal utility consortia, pipelines, producers, associated equipment manufacturers, government agencies, nonprofit organizations, and universities. The AGCC and its members act as a catalyst to promote natural gas cooling equipment, heating/cooling systems, and dehumidification technologies. The success of such systems depends on the existence of markets in which they can readily be installed, interconnected, and utilized, potentially in competition with cooling technologies that would consume electricity provided by regulated utilities.

- *Amicus* International District Energy Association fosters the success of its members as leaders in providing reliable, economical, efficient and environmentally sound district energy services. Its vision is to advance global environmental quality through efficient district energy. The Association's membership of about 900

members worldwide, including 850 in the United States, consists of representatives from utilities, municipals, universities, hospitals, military bases, airports, industrial parks, and other physical plant systems engaged in the supplying of thermal energy in the form of steam, and hot and chilled water for heating, cooling and process uses. The success of district energy systems requires a market in which the efficiency and cleanliness of district energy can compete fairly with the provision of steam, heating or cooling through separate appliances using electricity or fuels, including those provided by regulated utilities.

- *Amicus* Distributed Power Coalition of America was created to facilitate and advocate the optimal use of distributed power for the placement of electric power generation at the point of need. Members of DPCA include utilities, end users, power equipment manufacturers, pipelines, electric and gas marketers, and research organizations. The success of distributed power applications requires markets for energy services in which such applications can compete fairly with centralized electricity generation delivered through transmission and distribution wires, which generally remain regulated as monopoly utility systems.

Each of the Associations joined in this brief therefore seeks markets for energy services that are open to the competitive efforts of their members, and are potentially competing among themselves as well as with others. This potential competition includes both members and non-members of the Associations who retain regulated monopoly status in one or more specific energy products such as electricity or natural gas service.

The Associations submit that the Court should grant the writ sought by petitioner because of the profoundly negative effect on national policies promoting competitive energy markets if the lower court decision is allowed to stand unreviewed. If anticompetitive acts can be committed with impunity outside the defined monopoly market by the protected utility, or can be committed without the assurance that they are closely reviewed for consistency with the public interest, competitive entrants will be deterred and the benefits of competition will not be fully realized. As a result, this case presents an issue of critical importance to the competitive strength of the national market for energy services.

*Amici curiae* believe that it is critical to recognize that the relevant market in this case, and the relevant energy markets for national policy purposes, are markets for energy services, rather than markets for energy itself. Consumers do not purchase energy for its own sake, but instead to have the services that require energy: heat, light, cooling, dehumidification, transportation, products from industrial processes, etc. In many instances, different forms of energy can compete to provide the same energy service. Heating can be provided to buildings, for example, in many ways: electric resistance heating, electric heat pump, oil furnaces, natural gas furnaces, hot water delivered through a district energy system, hot water from a solar system, firewood in fireplaces or wood stoves, or coal furnaces, among others. The market for providing heat to buildings is therefore potentially a highly competitive market. It is critical that no one entrant or group of entrants has the power to commit anticompetitive actions in seeking to win that market

shielded by immunity from antitrust liability drawn from the regulated monopoly granted over its production or delivery of one of the competing forms of energy capable of serving that market.[2]

In this case, it is clear that Trigen was not competing in the electricity market (although the record below suggests that OG&E was motivated to oppose Trigen in part out of fear that Trigen would, when the law allowed, compete directly in the electricity market).[3] It is also clear that OG&E recognized that it was competing with Trigen, but OG&E was not competing in the market for chilled water. Instead, both were competing in the market for building cooling services, a market in which other forms of energy (natural gas cooling, for example) could also potentially compete. Indeed, this is what the jury found in this case to be the relevant market: the market for cooling services. It is unquestionable that the State of Oklahoma did not seek to regulate the market for cooling services in buildings, and that Trigen did not become a regulated utility in seeking to serve this market by delivering chilled water through its pipes. Neither did the State provide nor intend that its electric utilities take actions to make electricity the exclusive form of providing cooling services or otherwise monopolize the cooling

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[2] The Associations do not argue that regulated utilities should be excluded from such competition, nor that they be barred from competing through price offers reflecting regulated rates. Rather, they should simply not be protected from antitrust liability for non-price anticompetitive actions taken to extend their monopolies from the regulated markets into unregulated markets.

[3] 10th Cir. App. vol. VI at 1182-89.

services market. Therefore, OG&E was clearly participating in an unregulated and competitive market in its efforts to win market share in promoting cooling services that required electricity and endeavoring to defeat competitors-offering cooling services in other manners. The critical question is whether OG&E's antitrust immunity derived from its status as a regulated monopoly for the delivery and retail sale of electricity should extend to immunize the blatantly anticompetitive actions the jury found it had committed in the competitive market for cooling services. The answer will determine the competitive rules and therefore the potential to obtain competitive benefits in every market for energy services across the United States, including the markets in which the members of the Associations *amici curiae* operate.

The importance of carefully defining the limitations of antitrust immunity afforded to a regulated energy utility operating outside its monopoly market is increasing. This is because national and state policies are increasing the role of competitive market forces, and diminishing the role of command-and-control regulation, in markets for energy services. To date the federal government and numerous states have enacted laws to restructure the energy industries to "unbundle" their markets into competitive and monopoly sub-markets. The report of the President's National Energy Policy Development Group, "National Energy Policy," stated in May 2001, when announcing the Administration's energy policy priorities:

> The electricity industry is going through a period of dramatic change. To provide ample electricity supplies at reasonable prices, states

> are opening their retail markets to competition. This is the most recent step in a long transition from reliance on regulation to reliance on competitive forces. This transition from regulation to competition began in 1978 with enactment of the Public Utility Regulatory Policies Act [cite omitted], which promoted independent electricity generation. Open-access transmission policies adopted by the Federal Energy Regulatory Commission (FERC) in the late 1980s further promoted competition in wholesale power markets. Congress largely ratified these policies with enactment of the Energy Policy Act of 1992 [cite omitted], which further promoted non-utility generation. FERC took another large step to promote competition with its open-access rule in 1996, which provided greater access to the transmission grid, the highway for interstate commerce in electricity. Increased competition in wholesale power markets encourages states to open retail electricity markets. . . . Beginning in 1996, states began opening their retail markets to competition in order to lower electricity prices. Twenty-five states have opted to open their retail electricity markets to competition.[4]

As markets formerly served by fully-integrated utility monopolies are partially or completely restructured to allow competitive market forces to create choices and lower costs for consumers, it is critical to *amici curiae* and their members that competition itself be protected by even-handed application of the antitrust laws. Granting a

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[4] Report of the National Energy Policy Development Group, *National Energy Policy*, May 2001. Government Printing Office, Washington, D.C. page 5-11 (Chapter 5, page 11).

utility antitrust immunity for its anticompetitive actions in any market in which its regulated product is sold competitively with another form of energy is incompatible with a policy of allowing, indeed encouraging, competition in energy services markets.

If these markets are to function properly, competitors to provide energy services must be assured the law will constrain regulated entities to the use of their monopoly privileges solely within their remaining and explicitly regulated monopoly markets. Close supervision within those markets of monopolistic actions is also necessary to assure they are not contrary to the public interest. To the extent regulated utilities elect to participate in competitive energy services markets, like the market for cooling services in which the Petitioner and Respondent were competing in this case, they must be obliged to compete fairly. They should not be exempted from antitrust liability for anticompetitive actions they commit in the competitive segments of the market on the basis of their continuing status as regulated monopolies with regard to one or more non-competitive functions.

The decision below wrongly extends the state action immunity doctrine beyond any exception this court has carved out. Immunity from antitrust liability granted because the defendant is a regulated monopoly has repeatedly been held by this Court to be limited to extend no further than the monopoly itself extends, and even within that extent requires that the anticompetitive actions be closely supervised by the state in an ongoing, conscious, and effective manner. If allowed to stand, the decision below will affect not just Trigen and OG&E, but

all participants in the energy services industries, including developers of industrial combined heat and power systems, building cooling, heating and power systems, district energy systems for heating, cooling, and power, and other distributed energy resources. As major trade associations representing many such entities, *amici curiae* call on the Court to review the decision of the Tenth Circuit in this case as a matter of critical priority to national policy favoring competition where feasible in energy markets.

## II. THE SCOPE OF THE STATE ACTION DOCTRINE MUST BE CLARIFIED

It has been almost ten years since this Court last addressed the scope of the state action doctrine. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Since then, there has been a sweeping transformation in the fundamental relationship between state regulated entities and private entrepreneurs in the competition for the provision of energy services. Today, it is increasingly the rule, rather than the exception, that private entrepreneurs are in a position to provide what were once regulated utility services to energy service consumers across the nation.

As set forth more fully in the policy discussion above, this tectonic shift in the competitive landscape makes it imperative that the rules of the game, and the rule of law, be understood by all those who influence the balance of competition, including reviewing courts. As the Tenth Circuit decision at issue underscores, that is

clearly not the case today with respect to the core question of the extent to which a regulated utility's conduct is insulated from federal antitrust scrutiny.

The Tenth Circuit found that state action immunity applies to OG&E because it met the *Midcal* two-pronged test: clearly articulated policy and active supervision. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). As Trigen has forcefully argued, and as *amici curiae* have noted above, the Tenth Circuit has mistakenly identified the relevant market, the market for cooling services, instead accepting that OG&E's anticompetitive actions were wholly within the electricity market in which it has a legal monopoly by effect of law. Oklahoma does not have a clearly articulated policy governing the cooling services market, and the Oklahoma Corporations Commission (OCC) does not regulate the cooling services market. *Amici curiae* submit that the lack of any State action creating a regulatory regime to apply to the cooling services market is sufficient to deny OG&E state action immunity for its anticompetitive actions in that market.

As Trigen notes, this Court previously visited this issue in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). In *Cantor*, this Court considered whether a regulated utility's lightbulb distribution program was entitled to immunity from antitrust claims under the state action doctrine. This Court held that the program distributing free light bulbs was not immune from the Sherman Act, and recognized that,

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*Id.* 428 U.S. at 596, 96
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*Oklahoma City Energy Corp. v. Okla-*

the mantra of *Midcal*, the Tenth Cir-
second prong is so far to one end of

the active supervisory spectrum as to render it virtually meaningless. It is also completely inconsistent with the more reasoned analysis employed by the Ninth and Third Circuits, both of which have concluded that the specific conduct at issue must be actively supervised by the state in order to be immunized by the state action doctrine.

In *Snake River Valley Electric Association v. Pacificorp*, 238 F.3d 1189 (9th Cir. 2001), the Ninth Circuit discussed and applied *Midcal*, *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). The court stated that,

> [t]he second prong of the *Midcal* test requires that the state "exercise ultimate control over the challenged [private] anticompetitive conduct." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). This prong ensures that "the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the state, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

*Snake River Valley*, 238 F.3d at 1193.

In considering Pacificorp's arguments that the statute in question was "self-policing" and therefore satisfied the active supervision prong, the Ninth Circuit determined that the "opt out" provision that was solely within the utility's control in effect gave the utility partial control over the no-competition policy. The Court found that this type of private regulatory power was what the active supervision prong of *Midcal* was supposed to prevent. *Id.*

at 1194. See also FTC v. Ticor Title Ins. Co., 504 U.S. at 634-35, 112 S.Ct. 2169. The Court found that the state did not actually exercise sufficient control over the specific conduct at issue to satisfy the active supervision requirement. *Snake River Valley*, 238 F.3d at 1195.

The Third Circuit has employed a similar analysis of the specific conduct at issue for purposes of applying the "problematic" second prong. In *A.D. Bedell Wholesale Company, Inc., et al. v. Philip Morris Inc., et al.*, 2001 WL 708447 (3d Cir. June 19, 2001) the court stated,

> [t]he second prong of the Midcal test is whether the resulting antitrust violation was "actively supervised" by the state. This standard is more problematic. The essential inquiry of the "actively supervised" prong is to determine if the "anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Rubber stamp approval of private action does not constitute state action. A state must independently review and approve the anticompetitive behavior to satisfy this prong of the Parker doctrine. *Patrick*, 486 U.S. at 101. "The active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *Ticor*, 998 F.2d at 1139.

*A.D. Bedell Wholesale Company, Inc.*, 2001 WL 708447 at *15.

The Third Circuit went on to hold that the "active supervision" prong was not satisfied, and stated "[i]t is the conduct that violates the antitrust laws that states must 'actively supervise' in order for Parker immunity to attach." *Id.* at *17.

Amici submit that the analysis employed by both the Ninth and Third Circuits, analysis that focuses on whether there was active supervision over the specific conduct at issue, is precisely what this Court intended for purposes of applying the second prong of the *Midcal* test. In *Patrick*, this Court stated that,

> [t]he active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." (Citation omitted). The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. . . . To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . The mere presence of some state involvement or monitoring does not suffice. (Citations omitted) (emphasis added).

*Id.*, 486 U.S. at 100-101, 108 S.Ct. at 1663.

This Court went on to say,

> [t]he active supervision prong of the *Midcal* test requires that state officials have **and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy**. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

*Id.* (Emphasis added).

In *Ticor*, this Court noted generally that "state-action immunity is disfavored, much as are repeals by implication." *Id.* 504 U.S. at 636, 112 S.Ct. at 2178 (citation omitted). This Court further stated that,

> [o]ur decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among the parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own. . . . The mere potential for state supervision is not an adequate substitute for a decision by the State. *Id.* 504 U.S. at 634-35, 638, 112 S.Ct. at 2177, 2179.

*Amici* respectfully submit that *Midcal*, *Patrick*, and *Ticor*, taken together, stand for the proposition that merely having power to supervise is not sufficient for the purpose of granting immunity under the state action doctrine. That power must be exercised, and it must be exercised with respect to the "particular anticompetitive acts of private parties." *Patrick*, 486 U.S. at 100-101, 108 S.Ct. at 1663.

As noted, the Tenth Circuit only found that the OCC has "general supervision" and power and authority over OG&E. There was no analysis or specific finding of active supervision over the anticompetitive acts OG&E engaged in that affected Trigen. This analysis, or lack thereof, is contrary to *amici's* interpretation of this Court's prior rulings and to the approach taken by the Ninth and Third Circuits. Indeed, if the approach of the Ninth and Third is correct, the Tenth must be in error. There is simply not room for both interpretations within the spectrum of "active supervision."

Thus, at the very least, the Tenth Circuit decision highlights the "problematic" nature of the second prong of the *Midcal* test. Given the overarching public policy considerations that are at stake, this Court should take the opportunity to clarify the extent to which the specific conduct at issue must be found to have been actively supervised by the state in order to satisfy *Midcal* and invoke the state action doctrine.

## CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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September 28, 2001